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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Judith L. Corley, Esq.
Rebecca H. Gordon, Esq.
Perkins Coie
670 Fourteenth Street, N.W.
Washington, DC 20005

SEP 7 2010

RE: MURs 6078/6090/6108/6139/6142/6214
Obama for America
and Martin Nesbitt, in his official capacity as
Treasurer

Dear Ms. Corley and Ms. Gordon:

On September 29, 2008, October 14, 2008, November 3, 2008, December 9 and 11, 2008, and September 18, 2009, the Federal Election Commission notified your client, Obama for America and Martin H. Nesbitt, in his official capacity as Treasurer, of complaints alleging violations of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of each complaint was forwarded to your client at that time.

Upon further review of the allegations contained in the complaints, and information supplied by your client, the Commission, on August 24, 2010, found that there is reason to believe Obama for America and Martin Nesbitt, in his official capacity as Treasurer, violated 2 U.S.C. § 441a(f), a provision of the Act, and authorized an audit pursuant to 2 U.S.C. § 437g. Also on this date, the Commission dismissed allegations that Obama for America and Martin Nesbitt, in his official capacity as Treasurer, violated 2 U.S.C. §§ 441e and 441f. The Factual and Legal Analysis, which forms a basis for the Commission's findings, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

Please note that you have a legal obligation to preserve all documents, records and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. See 18 U.S.C. § 1519.

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Judith L. Corley, Esq.
Rebecca H. Gordon, Esq.
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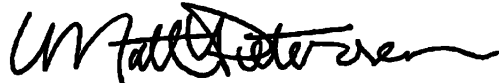
If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public.

If you have any questions, please contact Camilla Jackson Jones, the attorney assigned to this matter, at (202) 694-1650.

On behalf of the Commission,



Matthew S. Petersen
Chairman

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Obama for America and MURs: 6078/6090/6108/6139/6142/6214
Martin Nesbitt, as Treasurer

I. INTRODUCTION

These six matters involve overlapping allegations that Obama for America and Martin Nesbitt, in his official capacity as Treasurer ("OFA" or the "Committee") - Barack Obama's principal campaign committee for the 2008 presidential election - accepted various excessive and/or prohibited contributions in violation of the Federal Election Campaign Act of 1971, as amended, ("FECA" or "the Act").

The complaints vary in their approach to presenting similar allegations. While some of the complaints rely primarily on media reports regarding anecdotal examples of allegedly suspicious online fundraising transactions, *see* MURs 6078/6090/6108, other complaints provide a listing of transactions that are alleged to be part of suspicious patterns in OFA's fundraising receipts. *See* MURs 6139, 6142, 6214. Rather than attempting to address all of the transactions being questioned, OFA focuses on its comprehensive compliance system, and asserts that this system allowed them to identify and take appropriate corrective action as to all contributions for which there were genuine questions as to possible illegality. *See* OFA Responses in MURs 6078/6090/6108, MURs 6139 & 6142 and MUR 6214. Respondents assert that all genuinely excessive and prohibited contributions detailed in the complaints have been refunded. Respondents also contend that Complainants' allegations are highly speculative, lack the specificity needed to demonstrate a violation of the Act, and that the patterns identified by Complainants do not support any inference of illegality. *Id.*

1 During the 2007-2008 election cycle, the Commission's Reports Analysis Division
2 ("RAD") sent the Committee multiple Requests for Additional Information ("RFAs") regarding
3 apparent excessive contributions of the same general type as those identified in the complaints.
4 While the Committee was responsive to issues raised in the RFAs, a review of Committee
5 disclosure reports suggests that OFA has accepted, and failed to take timely corrective action
6 with regard to excessive contributions, which may total between \$1.89 million and \$3.5 million.
7 See Chart A, *infra*.

8 Based on a review of the complaints, the responses, and other available information,
9 including the Commission's analysis of disclosure reports, it appears that OFA accepted
10 excessive contributions that were not refunded or otherwise cured in a timely fashion.
11 Accordingly, for reasons explained in more detail below, the Commission found reason to
12 believe that Obama for America and Martin Nesbitt, in his official capacity as Treasurer, violated
13 2 U.S.C. § 441a(f), and authorized a Section 437g audit.

14 In contrast to the substantial support for allegations relating to excessive contributions,
15 the allegations that OFA accepted prohibited contributions from foreign nationals (in violation of
16 Section 441e) and from fictitious names (in violation of Section 441f) are either wholly
17 speculative or appear to involve sums that are *de minimis* both in terms of dollar amount and as a
18 percentage of OFA's overall receipts. Accordingly, for reasons explained in more detail below,
19 the Commission dismissed allegations that Obama for America and Martin Nesbitt, in his official
20 capacity as Treasurer, violated 2 U.S.C. §§ 441e and 441f.

1 **II. FACTUAL AND LEGAL ANALYSIS**

2 The primary issue in these matters is whether Respondents accepted impermissible
3 contributions through their online fundraising efforts. Although the Commission has not
4 mandated specific procedures to verify the identity of an individual making a credit card
5 contribution over the Internet, it has opined that a committee which intends to solicit and receive
6 credit card contributions over the Internet must be able to verify the identity of those who
7 contribute via credit card with the same degree of confidence that is generally provided when a
8 committee accepts a check via direct mail.¹ Advisory Opinion 2007-30 (Chris Dodd for
9 President, Inc.); *see also* Explanation and Justification for Matching Credit Card and Debit Card
10 Contributions, 64 Fed. Reg. 32394, 32395 (June 17, 1999); Advisory Opinion 1999-09 (Bill
11 Bradley for President, Inc.); Advisory Opinion 1995-09 (NewtWatch PAC); *see also*
12 Commission Guideline for Presentation in Good Order (guidance to presidential campaigns
13 seeking federal matching funds, presented by the Audit Division and approved by the
14 Commission in July 2007). In sum, a committee is charged with the same responsibility to "allay
15 concerns over the receipt of prohibited contributions" regarding its online contributions as its
16 contributions solicited and received through any other method. *Id.* (quoting Matching Credit
17 Card and Debit Card Contributions, 64 Fed. Reg. at 32395).

¹ Advisory Opinions have looked favorably upon several methods for notifying contributors of a committee's legal obligations as well as verifying contributors' identities, including: using web page solicitation forms that post clear and conspicuous language informing prospective donors of the Act's source restrictions and contribution limits, requiring a donor to complete and submit for processing a contribution form that includes the contributor's name, contributor's name as it appears on a credit card, billing address associated with the card number, expiration date of the card, contributor's residential address and amount of contribution. *See, e.g.,* AO 2007-30 at 3. The committee should also include questions that will allow it to screen for contributions made using corporate or business entity credit cards, and a process whereby the donor must attest: (1) the contribution is made from his own funds and not those of another; (2) contributions are not made from general treasury funds of a corporation, labor organization or national bank; (3) donor is not a federal government contractor or a foreign national, but is a citizen or permanent resident of the United States; and (4) the contribution is made on a personal credit card for which the donor, not a corporation or business entity, is legally obligated to pay. *Id.* at 2-4.

1 As a safeguard against receiving prohibited contributions, the Act's regulations hold the
2 committee's treasurer "responsible for examining all contributions received for evidence of
3 illegality." 11 C.F.R. § 103.3(b). While contributions that may "present genuine questions" as
4 to whether they were made by foreign nationals or other prohibited parties may initially be
5 deposited into a campaign's depository, the treasurer is charged with making his or her "best
6 efforts to determine the legality of the contributions." 11 C.F.R. § 103.3(b)(1). If the
7 contribution ~~cannot~~ be determined to be legal, or is discovered to be illegal even though it "did
8 not appear to be illegal" at the time it was received, the treasurer must refund the contribution
9 within thirty (30) days of the date of said discovery. 11 C.F.R. § 103.3(b)(2). By contrast, if the
10 committee determines that a contribution exceeds the contribution limitations enumerated in
11 2 U.S.C. § 441a(a)(1), the treasurer has sixty (60) days to refund the excessive contribution, or
12 obtain a written redesignation or reattribution of the excessive portion. 11 C.F.R.
13 § 110.1(b)(3)(i).

14 **A. Background**

15 Obama for America is the principal campaign committee for President Barack Obama.
16 During the 2008 election cycle, OFA, as an authorized candidate committee, was limited to
17 contributions from individual donors who in the aggregate did not exceed \$2,300 each for the
18 primary and general elections. 2 U.S.C. § 441a(a)(1)(A). Since filing its Statement of
19 Organization on January 16, 2007, the Committee raised over \$745 million from over 3.9 million
20 contributors, approximately \$450 million of which was received in online contributions through
21 the campaign's website. OFA Response in MURs 6078/6090/6108 at 1-2.

22 Respondents explain that, to handle the unprecedented number of donors, volume of
23 online contributions and dollars raised, they maintained a comprehensive system to review all

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1 online contributions for compliance with the FECA. OFA Response in MURs 6078/6090/6108
2 at 2-4, OFA Responses in MURs 6139 & 6142 at 2-3. The Committee asserts that its internal
3 system of review surpassed the procedural requirements for the collection and processing of
4 contributions set forth in the Act, and that as the volume of contributions increased, the
5 Committee continually readjusted its procedures to ensure that all contributions received
6 complied with the Act's requirements. OFA Response in MURs 6078/6090/6108 at 3-4; OFA
7 Responses in MURs 6139 & 6142 at 2-3.

8 The consolidated OFA Response for MURs 6078, 6090 and 6108 includes an Affidavit
9 from the Committee Chief Operating Officer Henry DeSio, who describes the requirements in
10 the online contribution process that must have been met before the website would accept a
11 contribution:

- 12 • The Committee online contribution page informed each prospective donor of the
13 Act's source restrictions, in explicit language displayed in a conspicuous location
14 that the donor could not miss;
- 15 • No donor could make a contribution without first affirming that the funds were
16 lawful and consistent with the Act's requirements, by checking a box confirming
17 that the donor was a United States citizen or permanent resident, that the funds
18 were not from the treasury of a person or entity who was a federal contractor,
19 corporation, labor organization or national bank, and were not provided by any
20 person other than the donor;
- 21 • Donors who entered foreign addresses were required to check a box confirming
22 that they were either a United States citizen or a permanent resident alien, and
23 provide a valid U.S. passport number. *Id.* at 3-4; *see also* Affidavit of Henry
24 DeSio ("DeSio Aff.") ¶¶ 3-6.

25 The DeSio Affidavit goes on to describe the compliance and vetting process that occurred
26 after the online contributions were processed by a third party vendor and submitted to the
27 Committee:

- 1 • At regular intervals the Committee conducted automated searches of its donor
2 database, which included all contributions (whether raised online or through other
3 mechanisms), to identify any fraudulent or excessive donations;
- 4 • Contributions from repeat donors were examined to ensure that the total amount
5 received from a single donor did not exceed contribution limits; and
- 6 • As examples of questionable information, erroneous data or fraudulent
7 contributions were identified, the Committee's automated searches were refined
8 to query other contributions that might contain similar patterns of erroneous or
9 fraudulent data. *Id.* at 4.

10 Respondents also deny allegations that the Committee received excessive contributions,
11 including contributions from its joint fundraising committee, the Obama Victory Fund and
12 Andrew Tobias in his official capacity as Treasurer, and assert that all contributions were
13 properly allocated, and refunded, redesignated or reattributed, as appropriated. OFA Responses
14 in MURs 6139 & 6142 at 2-3.

15
16 **B. Excessive Contribution Allegation**

17 **1. Facts**

18 The complaints involve allegations based on Complainants' direct review of disclosure
19 reports filed by the Committee as well as information gleaned from online media reports, and
20 claim that Respondents accepted excessive contributions in addition to knowingly receiving
21 contributions from prohibited sources. Fling Complaint at 2; RNC Complaint at 1-4; Kahtz
22 Complaint at 1; Daniels Complaint at 1; Means Complaint at 1. Complainants list hundreds of
23 individuals whom they claim made contributions exceeding \$4,600 (which would be the
24 aggregate total of the permissible amounts of \$2,300 each for the primary and general elections)
25 and contend that this is evidence that the Committee's contribution processes were utterly
26 lacking in the appropriate internal controls to ensure compliance with the FECA. Fling

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1 Complaint at 2; RNC Complaint at 1-4; Kohtz Complaint at 1; Daniels Complaint at 1; Moore
2 Complaint at 1.

3 Respondents reply that their comprehensive vetting and compliance system was designed
4 to identify all excessive contributions, including those specifically referenced in the complaints,
5 and redesignate, reattribute, or refund contributions, as appropriate. OFA Response in MURs
6 6078/6090/6108 at 5; OFA Responses in MURs 6139 & 6142 at 2. Specifically, the Committee
7 contends that only 112 of the 602 individuals originally identified in complaints for MURs 6139
8 and 6142 made contributions that were potentially excessive but later refunded; the rest, they
9 assert, actually were compliant with the Act. OFA Response in MUR 6139 at 3, OFA Response
10 in MUR 6142 at 3. Respondents provide attachment spreadsheets that list the individuals they
11 assert were compliant, as well as those who made potentially excessive contributions that were
12 later refunded or otherwise cured (some timely and some untimely).² OFA Response in MURs
13 6078/6090/6108 at 5; OFA Response in MUR 6139, Exh. A; OFA Response in MUR 6142, Exh.
14 A. Respondents argue that their demonstration that most examples of excessive contributions
15 cited in the initial complaints were either compliant or rectified in a timely manner, is evidence
16 that there is no need for an investigation of their finances and reporting, and that those matters
17 should be dismissed.

18 The Commission reviewed the Committee's disclosures for the 2008 election cycle,
19 which reflect that the Committee reported raising approximately \$745,689,750 during that time
20 period. The review determined that the Committee may have received between \$1.89 and \$3.5

² The complaint in MUR 6142 has been supplemented 38 times, most recently on December 2, 2009, which lists thousands of transactions that are alleged to be questionable and/or represent excessive contributions. The Committee's Response to MURs 6139 and 6142 dated Dec. 29, 2008 addresses some of the transactions specifically identified in the supplements filed up to that date, but was not amended to address the supplemental complaints filed after that date, and offers the same general explanations provided in its response to MURs 6078/6090/6108.

- 1 million in excessive contributions during the 2007-2008 cycle. These apparent excessive
2 contributions are reflected in Chart A below.

3 *Chart A*

Report	Excessive Contributions	Total Contributions Reported
Q1 07	\$103,382	\$25,702,886
Q2 07	\$116,241	\$32,889,836
Q3 07	\$47,260	\$20,652,528
YE 07	\$18,342	\$22,847,567
M2 08	\$35,151	\$36,188,803
M3 08	\$15,302	\$55,444,869
M4 08	\$44,825	\$41,161,694
M5 08	\$26,787	\$30,732,459
M6 08	\$22,287	\$21,953,056
M7 08	\$95,010	\$51,909,906
M8 08	\$359,986	\$50,337,860
M9 08	\$2,295,521 ³	\$65,090,662
M10 08	\$110,464	\$150,708,708
12G 08	\$27,623	\$35,944,385
30G 08	\$218,690	\$104,124,845
TOTAL	\$3,536,778⁴	\$745,689,750

- 4
5 The Commission issued numerous RFAs to enable the Committee to explain or rectify
6 its excessive contributions. Though the Committee made significant efforts to identify,

³ The Commission identified \$2,295,521 in potential excessive contributions based on the M9 Report, which included \$367,166 in excessive contributions from 317 individuals that were not refunded, redesignated or reattributed within 60 days of receipt, plus \$1,928,355 in contributions designated for the 2008 primary election that were reportedly received after the date of the candidate's nomination. A subsequent review of the disclosure reports indicates that approximately \$1,646,236 of these primary-after-primary contributions appear to have been received by the joint fundraising committee before the candidate accepted his party's nomination, but the reported "contribution date" was the date the funds were transferred from OFA to the Committee. Therefore, \$1,646,236 in contributions currently categorized as "primary-after-primary" might not be excessive, but were simply reported incorrectly by the Committee. The investigation will clarify whether the Committee properly reported the receipts in its M9 disclosures.

⁴ Should the \$2,295,521 in excessive contributions identified by RAD be determined to be over-inclusive due to a reporting error, the excessive contributions for M9 may be reduced to \$649,284 and the Committee's total potential excessive contributions may be reduced to \$1,890,541.

1 redesignate or refund a significant number of the excessive contributions identified in the
2 Commission's RFAs, the Committee failed to redesignate, reattribute or refund millions in
3 excessive contributions in a timely manner.

4 2. **Analysis**
5

6 The FECA provides that no person shall make contributions to a candidate for federal
7 office or his authorized political committee, which in the aggregate exceed \$2,300 each for the
8 primary and general elections. 2 U.S.C. § 441a(a)(1)(A). For the 2008 election cycle, the Act
9 permits a national political party to receive from individuals or persons other than a
10 multicandidate committee up to \$28,500. 2 U.S.C. § 441a(a)(1)(B). Additionally, a joint
11 fundraising committee established pursuant to 11 C.F.R. § 102.17, may accept up to \$33,100 per
12 donor. 11 C.F.R. § 102.17(a). The Act prohibits a candidate or political committee from
13 knowingly accepting contributions in violation of the contribution limits set forth in the FECA,
14 see 2 U.S.C. § 441a(f), and where a committee has received an excessive contribution, it has
15 sixty (60) days to identify and redesignate, reattribute or refund the excessive amount. 11 C.F.R.
16 § 110.1(b); see also discussion, *supra*, pp. 5-6.

17 The complaints made allegations that the Committee received numerous excessive
18 contributions based on disclosure reports filed with the Commission, but provided no
19 information as to how or whether a contribution that might appear to be excessive on its face was
20 resolved. The Committees' responses to the complaints generally aver that it maintained a
21 robust compliance system for identifying and remedying excessive contributions, but it fails to
22 explain how, despite this system, many excessive contributions were apparently left unresolved.

23 Based on a review of the Committee's disclosure reports, the amount of unresolved
24 excessive contributions range between \$1.89 and \$3.5 million which, while less than .5% of the

1 total contributions received, is a substantial amount in potential violation.⁵ Accordingly, the
2 Commission found reason to believe Obama for America and Martin Nesbitt, in his official
3 capacity as Treasurer, accepted excessive contributions in violation of 2 U.S.C. § 441a(f) and
4 authorized an audit under 2 U.S.C. § 437g to work coextensively with the Section 438(b) audit
5 already underway.

6 **C. Possible Foreign National Contributions**

7 The FECA provides that it is unlawful for a foreign national, directly or indirectly, to
8 make a contribution or donation of money or other thing of value in connection with a Federal,
9 State, or local election, or to a committee of a political party and for a federal political committee
10 to receive or accept such a contribution. 2 U.S.C. § 441e(a)(1) and (a)(2); 11 C.F.R. § 110.20(b).

11 A "foreign national" is an individual, partnership, association, corporation or other entity
12 organized under the laws of or having its principal place of business in a foreign country.
13 2 U.S.C. § 441e(b). A "foreign national" does *not* include a person who is a citizen, national or
14 lawful permanent resident of the United States. *Id.*

15 Although the statute is silent as to any knowledge requirement, the Commission's
16 implementing regulations clarify that a committee can only violate Section 441e with the
17 *knowing* solicitation, acceptance, or receipt of a contribution from a foreign national. 11 C.F.R.
18 § 110.20(g). The regulation contains these standards that satisfy the "knowing" requirement:
19 (1) actual knowledge; (2) reason to know; and (3) willful blindness. 11 C.F.R. § 110.20(a)(4)(i)-
20 (iii). The reason-to-know standard is satisfied when a known fact establishes "[s]ubstantial

⁵ The Commission has pursued civil penalties in enforcement matters involving excessive contributions that are a fraction of the amount identified in this matter. See MUR 5408 (Sharpton) (conciliating 441a(f) violations totaling \$19,500); MUR 5488 (Bradley Smith) (conciliating 441a(f) violations totaling \$40,500); MUR 5496 (Huffman) (conciliating 441a(f) violations totaling \$100,000); MUR 5568 (Empower Illinois) (conciliating 441a(f) violations totaling \$70,000); MUR 5749 (GSP Consulting Corp. PAC) (conciliating 441a(f) violations totaling \$28,800); MUR 5887 (Schwarz for Congress) (conciliating 441a(f) violations totaling \$4,748); MUR 5889 (Republicans for Trauner) (conciliating 441a(f) violations totaling \$17,099).

1 probability" or "considerable likelihood" that the donor is a foreign national. See Explanation
2 and Justification for Prohibition on Contributions, Donations, Expenditures, Independent
3 Expenditures and Disbursements by Foreign Nationals, 67 Fed. Reg. 69940, 69941 (quoting
4 BLACK'S LAW DICTIONARY, 5th Ed. (1979)). The willful blindness standard is satisfied when "a
5 known fact should have prompted a reasonable inquiry, but did not." See *id.* at 69940.⁶

6 1. Facts

7 Several of the complaints allege that the Committee violated 2 U.S.C. § 441e by
8 accepting contributions from foreign nationals. As support for these allegations, different
9 Complainants focus on the following facts: (1) approximately 10,400 contributors with foreign
10 addresses gave \$1.3 million to the Committee; (2) approximately 500 contributions from
11 contributors with foreign addresses were not made in whole dollar amounts (which Complainants
12 suggest means that the funds had been converted to U.S. dollars from a foreign currency); and
13 (3) various media outlets reported that foreign nationals may have contributed to the Committee.

14 Complainants argue that there are widespread problems with the Committee's
15 compliance systems, which warrant investigation into all of the Committee's contributions
16 received from individuals with foreign addresses. Fling Complaint at 1; RNC Complaint at 1-2;
17 Kohitz Complaint at 1; Daniels Complaint at 1; Moore Complaint at 1. The Complainants who

⁶ Before the regulation was revised in 2002, Commissioners expressed concerns about the level of scienter required under Section 441e. For example, a Statement of Reasons ("SOR") issued in a Section 441e case decided shortly before revision of the regulation examined the statutory language and legislative history to conclude that despite the absence of precise language of a "knowledge requirement" in the statute, "it would be fundamentally unjust to assess liability on the part of a fundraiser or recipient committee that solicits or receives a contribution if the contribution in fact appears to be from a legal source, especially if initial screening efforts resulted in specific assurances of the contribution's legality." MURs 4530, 4531, 4547, 4542, 4969 (Statement of Reasons by Commissioner Thomas *In re Democratic National Committee, et al.*) at 3. Thus, coupled with the Explanation and Justification issued in November 2002, a knowledge requirement may be inferred based on similar provisions in the Act that specifically included such language despite the absence of any knowledge requirement in the statute. *Id.* at 2 (citing 2 U.S.C. §§ 441f, 441b(4)). See also 11 C.F.R. § 103.3(b)(1), which provides that contributions which did not appear to be from a prohibited source must be returned within a specified period from the date on which the Committee becomes aware of information indicating that the contribution is unlawful.

1 rely merely on the Committee's receipt of contributions from individuals with foreign addresses
2 generally provide no additional facts to substantiate their claims these individuals are foreign
3 nationals, as opposed to eligible donors temporarily living abroad. One complaint points to a
4 newspaper report that asserts that the Committee received 37,265 contributions that were not in
5 whole dollar amounts, which the author concludes could be evidence that those contributions
6 were converted from foreign currencies to the U.S. dollar, and therefore came from foreign
7 nationals. MUR 6090 Complaint (citing Ex. K). Complainants offer no information to support
8 the conclusion that such funds were contributed in foreign currencies or that the individuals who
9 made contributions in foreign currencies were not lawful donors. Finally some of the complaints
10 cite media reports with anecdotal allegations of foreign nationals having contributed to the
11 Committee. Examples of these media reports include:

- 12 • A report about a group in Nigeria was reported to have sponsored an event, the
13 proceeds of which were purportedly going to be donated to the Committee, but
14 were seized by the government in a fraud investigation. MUR 6090 Complaint at
15 1-3 (citing Attach. A);
- 16 • Media coverage of a public statement made by Libyan leader Muammar al-
17 Gaddafi opining that foreign nationals supported candidate Obama and may have
18 contributed to the Committee. *Id.* (citing Attach. C);
- 19 • Un-sourced allegations that an anonymous FEC analyst informed his superiors
20 that the Committee had accepted millions of prohibited contributions from foreign
21 nationals and his warnings went unheeded.⁷ *Id.* (citing Attach. D);
- 22 • Reports about two brothers who owned a shop in the Gaza Strip and made bulk
23 purchases of Obama t-shirts to sell in their store. *Id.* (citing Attach. A, E, F);
- 24 • Article about an Australian man who admitted to knowingly using a fake U.S.
25 passport number in order to get the Committee's online contribution system to
26 accept his contribution. *Id.* (citing Ex. H); and
- 27 • Report about and a Canadian man who deliberately made false statements in order
28 to get the Committee's online contribution system to accept his contribution. *Id.*

⁷ Despite efforts by the Commission, the veracity of these allegations has not been confirmed to date.

1 The Committee maintains that its vetting procedures required online contributors to
2 confirm citizenship or permanent resident status by checking a box. OFA Response in MURs
3 6078/6090/6108 at 4. Further, contributors with foreign addresses had to enter a valid U.S.
4 passport number. *Id.* Finally, the Committee asserts that it maintained a system that at regular
5 intervals surveyed all contributions received from foreign addresses, personally contacted
6 contributors who were not known to be U.S. citizens or lawful permanent residents, and required
7 the submission of valid U.S. passport information. *Id.* at 5.

8 2. Analysis

9 The allegation that Respondents knowingly accepted contributions from foreign
10 nationals, or failed to refund contributions after becoming aware of a basis for questioning
11 whether the contributions were from a permissible source, is not supported by the available
12 information. As discussed below, each of the three principal methods of proof relied upon in the
13 complaints is flawed.

14 Complainants added up all contributions from donors with foreign addresses and alleged
15 that all or significant numbers of those contributions must have come from foreign nationals
16 because media reports had identified four foreign nationals who were alleged to have been
17 contributors. RNC Complaint at 1. The Committee received approximately \$1,314,717 in
18 contributions from 10,463 individuals with foreign addresses. The fact that these contributors
19 listed foreign addresses is not, as Complainants claim, *prima facie* evidence establish that the
20 contributors are foreign nationals or that their contributions should be suspect. 11 C.F.R.
21 § 110.20(a)(4)(i). Although Complainants argue for a comprehensive review of all contributors
22 with foreign addresses, neither the media reports nor the complaints offer any specific
23 information that would suggest that any of the contributors with foreign addresses, other than the

1 four specifically identified in the media reports, are not American citizens living abroad, who are
2 entitled to contribute to federal political committees.

3 Similarly, the argument that the presence of contributions in odd (non-whole dollar)
4 amounts is *prima facie* evidence that a contribution might have come from an impermissible
5 foreign source is incorrect. First, there is a wide variety of explanations for a contribution to be
6 in non-whole dollar amounts, other than being a foreign currency. Second, even if the
7 contribution was made using a foreign currency, there is no legal presumption that the use of
8 foreign currency is sufficient to establish that a contributor is a foreign national. A U.S. citizen
9 living abroad, who is entitled to make contributions, might be expected to use a credit card
10 account or a bank account based on the currency of the country in which they temporarily reside.
11 Neither the complaints nor media reports provide any information that would serve as reasonable
12 cause to question the citizenship of a contributor based solely on the amount of a contribution.

13 While information that a contribution is received from a foreign address, foreign bank
14 and/or in a currency other than U.S. dollars might serve as pertinent information in examining
15 the contribution, the mere presence of such indicators does not establish reason to believe that
16 the Committee violated the prohibition against receiving contributions from foreign nationals.
17 Rather, a Committee need only make a "reasonable inquiry" to verify that the contribution is not
18 from a prohibited source to satisfy the Act's compliance regulations. 11 C.F.R. § 110.20(a)(7).

19 Here, there is evidence that the Committee made reasonable inquiries into the source of those
20 funds by: (1) informing website users of the appropriate legal requirements for making
21 contributions; (2) requiring contributors who used the website to proffer the appropriate
22 certifications before processing their contributions; and (3) maintaining an internal system to
23 review all contributions received from foreign addresses for compliance with the FECA and its

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1 regulations. OFA Response in MURs 6078/6090/6108 at 4-5. There is also evidence that the
2 Committee's internal controls followed the Act's "safe harbor" guidelines by requiring donors
3 who attended fundraising events located outside of the United States or made contributions
4 online using foreign addresses to provide a valid U.S. passport number. *Id.*; see 11 C.F.R.
5 § 110.20(a)(7) ("[A] person shall be deemed to have conducted a reasonable inquiry if he or she
6 seeks and obtains copies of current and valid U.S. passport papers.").

7 The Commission reviewed the contributions received by the Committee from individuals
8 with foreign addresses who contributed to OFA during the primary and general election months
9 of February 2008 and August 2008, respectively.⁸ This review provided insight into how the
10 Committee's compliance system was working, whether it was effectively identifying potentially
11 prohibited contributions, and whether corrective action was taking place to resolve questionable
12 contributions. In addition to specific individuals identified in the complaints (*see* discussion
13 below), the Commission's review found only eight contributors living abroad (who contributed a
14 total of \$2,147) that failed to give personal information required for the OFA disclosure reports.
15 Consistent with the assertions in the Committee's response, the Commission's review found that
16 contributors outside of the United States were required to affirm that they were United States
17 citizens. *See* OFA Response in MURs 6078/6090/6108 at 4-5. In fact, the website would not
18 accept contributions from individuals outside of the United States without certification that they
19 were citizens or legal permanent residents. *Id.* Contributors outside of the United States were

⁸ The Commission has approved of the use of examining samples in order to ascertain whether excessive and prohibited contribution violations are substantial enough to warrant further inquiry. *See, e.g.*, 11 C.F.R. §§ 9007.2(f)(1) and 9038.1(f)(1) (approving the use of sampling in the audit context to determine whether excessive and prohibited contributions are significant enough to warrant referral for enforcement). Here, the Commission opted to review a sample of disclosure reports at the reason to believe stage in order to ascertain whether the violations of the Act alleged in the complaint are indicative of broader flaws in the Committee's compliance system and/or are significant enough to recommend that an investigation of the violations is warranted.

1 typically employed by the United States government or military, or working in the international
2 offices of American corporations, or for American non-profit, human rights or religious
3 organizations.

4 The contributions cited as examples of Section 441e violations in the complaints are
5 insufficient to support a reason to believe finding for the following reasons:

- 6 • There is no support for the inference that the Committee received contributions or
7 was in any way connected to the Nigerian fundraiser or its coordinators, as the
8 same media reports indicate that the Nigerian government seized the funds raised
9 and are investigating the matter as a fraudulent scheme. RNC Complaint, Exh. A.
- 10 • There is no information supporting the allegation that the general comments made
11 by Libyan leader Muammar al-Gaddafi claiming, "[People in the Arab and
12 Islamic world] welcomed [Barack Obama] and prayed for him and ... may even
13 have been involved in legitimate contribution campaigns to enable him to win the
14 American presidency" are related to any identifiable contributions or fundraising
15 efforts for the Committee. *Id.*
- 16 • The allegations that contributions received by the Committee, which were not
17 made in whole dollar amounts must have been made in foreign currency and
18 therefore have originated from foreign sources, is also purely speculative, as the
19 conversion of monies from one currency to another is not evidence that the
20 individuals that were the source of the funds were foreign nationals. *Id.*
- 21 • The Australian man cited in the media report admits (in the same report) that he
22 knowingly made the illegal contribution through bypassing the online security
23 protocols by entering a false passport number and fraudulently certifying that he
24 was an American citizen living abroad, in order to get the website to accept his
25 contribution. RNC Complaint, Exh. H, OFA Response in MURs 6078/6090/6108
26 at 4.
- 27 • While the Canadian donor did not admit to making false statements, he also
28 denied remembering whether he certified that he was a citizen and stated that he
29 later contacted the Committee to request a refund. RNC Complaint, Exh. H. The
30 Committee asserts that the website did require a certification of citizenship to
31 make contributions from a foreign address and the contribution from the donor
32 has since been refunded. OFA Response in MURs 6078/6090/6108 at 4.

33 See OFA Response in MURs 6078/6090/6108, Exh. A.

1 According to media reports, brothers Hosam and Monir Edwan bought t-shirts from the
2 Committee's website to sell in their Gaza store, the proceeds of which constituted contributions
3 to OFA from the Edwans totaling \$6,945 and \$24,770, respectively.⁹ RNC Complaint, Exh. A.
4 The same report indicates that the Edwan brothers inserted the abbreviation "GA" in the address
5 line reserved for the name of the contributor's state of residence, which the Committee might
6 have mistaken to stand for "Georgiu" rather than "Gaza." *Id.* The report also cites a campaign
7 official who states that until the media identified the Edwan brothers as being residents of Gaza,
8 the Committee had no reason to believe the Edwans lived outside of the United States. *Id.*

9 The Act provides that where a contribution does not present a genuine question of
10 whether it might be prohibited by the Act, but is later discovered to be illegal, a treasurer has
11 thirty (30) days from the date on which the illegality is discovered to refund the contribution.
12 11 C.F.R. § 103.3(b)(2). Here, the Edwan brothers made 28 t-shirt purchases, 22 of which were
13 refunded within 30 days of receipt.¹⁰ Refunds of the other six purchases (for \$4,130) were made
14 within two weeks of the first media report identifying the brothers as foreign nationals.

15 While it is unclear when the Committee discovered all of the contributors cited in the
16 media reports were foreign nationals, the Committee did refund all of the contributions within 30
17 days of those reports or the information about the identity of these contributors becoming public.
18 Moreover, the fact that a review of the Committee's disclosure reports has identified only \$2,147

⁹ It is well established that the proceeds from the purchase of fundraising items are considered to be campaign contributions. 11 C.F.R. § 100.53; *see also* AO 1975-15 (Wallace) (concluding that the full amount paid by a purchaser to a political committee or candidate for a fundraising item is a contribution); AO 1979-17 (RNC) (citing AO 1975-15) (The fact that the contributor received something of value in exchange for a political contribution does not change the character of the activity from a political contribution into a commercial sale/purchase transaction).

¹⁰ Hosam Edwan made seven contributions, six of which were refunded. Only the four smallest transactions (\$187, \$1,217, \$834 and \$308) were refunded outside the 30-day window. Monir Edwan made 21 contributions, all but two of which (for \$94 and \$1,290) were refunded within the 30-day window. *Id.* A total of \$4,130 of the contributions made by the Edwans was refunded outside the 30-day window, but within two weeks of the first media report.

1 in contributions from eight donors with foreign addresses that might be questionable, with no
2 additional information on whether they are in fact foreign nationals, mitigates against finding
3 reason to believe that the Committee violated 2 U.S.C. § 441e.

4 Because the potential Section 441e violations are limited in scope and amount (\$6,277)
5 and because there is insufficient information to suggest that the Committee acted unreasonably in
6 relying on the information provided by contributors affirming that they were United States
7 citizens, the Commission concluded that opening an investigation into this issue would be an
8 inefficient use of its limited resources. *See Heckler v. Chaney*, 470 U.S. 821 (1985); MUR 5950
9 (Hillary Clinton for President) (Factual and Legal Analysis dismissing Section 441e violation to
10 preserve resources where amount in potential prohibited contributions was minimal (\$1,000)
11 compared to total contributions received, and funds had been refunded before the complaint was
12 filed).

13 Accordingly, the Commission dismissed allegations that Obama for America and Martin
14 Nesbitt, in his official capacity as Treasurer, violated 2 U.S.C. § 441e by accepting contributions
15 from foreign nationals.

16 **D. Possible Contributions from Unknown Individuals**

17 The Act provides that no person shall make a contribution in the name of another person,
18 and no person shall knowingly accept a contribution made by one person in the name of another.
19 *See* 2 U.S.C. § 441f. A Committee has thirty days from the date that a prohibited contribution is
20 made or discovered to have been made to refund the impermissible contribution. 11 C.F.R.
21 § 103.3(b)(2).

22 The complaints allege that individuals made contributions to the Committee using
23 fraudulent or fictitious names, and the Committee's online fundraising mechanism provided no

1 internal controls to circumvent the receipt of such prohibited contributions. RNC Suppl.
2 Complaint at 3-4. Different Complainants present two types of arguments for why the
3 Committee should have been on immediate notice that certain contributions did not come from
4 legitimate sources. First, some of the complaints contend that certain contributions were linked
5 to names that were clearly fictitious, and the fact that such contributions were processed by the
6 Committee's online fundraising system is evidence of widespread failure in its compliance
7 system and warrants investigation. Second, one of the later complaints (MUR 6214) points to a
8 range of anomalies in the patterns of the contributions attributed to particular individuals as
9 being sufficiently unusual and unlikely as to put the Committee on notice that these contributions
10 were illegitimate.

11 **1. Facts**

12 The complaints cite media reports identifying 11 individuals whose names were listed on
13 the Committee's disclosure reports as contributors, but later were determined to have submitted
14 fictitious or fraudulent names, addresses or credit card information. Examples of these
15 individuals include:

- 16 • Good Will – an individual who listed his name as "Good Will," his employer as
17 "Loving," occupation as "You" and who provided an address that turned out to be
18 for a Good Will Industries charity office in Austin, TX. Reportedly, no one by
19 the name of Good Will works at the office. Good Will made over 780
20 contributions in \$25 increments between March 2008 and April 2008, totaling
21 over \$19,500;
- 22 • Doodad Pro – an individual who listed his name as "Doodad Pro," his residence
23 as Nando, NY, occupation as "Loving," and employer as "You" made over 850
24 contributions in \$25 increments between November 2007 and April 2008, totaling
25 over \$21,250;
- 26 • Persons with fictional addresses – some individuals provided questionable names
27 and fictitious addresses, including "Test Person" residing in Santa Fe, UT,
28 "Jockin Albertan" residing at a fictional address in Wilmington, DE, "Derty

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1 West" and "Derty Poiuy" both residing in rewq, ME and "fhdfhdfh" residing in
2 Erial, NJ; and

3 • Persons with obvious fictional names – some individual donors provided
4 nonsensical names including, "Hbkjb, jkbkj," "Jgtj Jfggjfgj," "Dahsudhu
5 Hdusahfd," Uadhshgu Hduadh," "Edrty Eddty" and "Es Esh."

6 During the course of its compliance process, and before the names were made public in
7 media reports or complaints, the Committee asserts that had already identified many of these
8 same contributions as being of questionable legitimacy. Disclosure reports indicated that several
9 of the "contributions" made by fictitious donors cited in the complaints either were never
10 accepted due to invalid information (e.g., invalid credit card or banking information) or were
11 refunded immediately. In other instances, where contributions were accepted, refunds occurred
12 on a continuous basis. For instance, in the case of Doodad Pro and Good Will, who made
13 hundreds of contributions in small increments, refunds were done on a rolling basis before their
14 contributions appeared in media reports. Further, most of the refunds were completed to almost
15 all of these prohibited contributors within weeks of the first media reports and/or the initial
16 complaints filed with the Commission.

17 The Complaint in MUR 6214 makes an extensive and detailed analysis of various
18 patterns in the Committee's receipts. This complaint alleges that the Committee failed to make
19 immediate use of an Address Verification System to confirm that each contributor's reported
20 address information matched the address information for the credit card used to make the
21 contribution, which allowed the Committee to accept online contributions in transactions that
22 would have been rejected by other vendors accepting credit card payments over the internet.
23 This complaint suggests that the absence of this safeguard raises questions as to whether the
24 Committee adequately verified the true sources for online contributions it received via credit
25 card. In addition, this complaint identifies the following contribution patterns which it deemed

1 suspicious: 1) Non-Dollar Donations that were not in whole dollar amounts; 2) Non-Traditional
2 Donations that were in whole dollar amounts, but not in multiples of \$5; 3) Multiple Day
3 Donations where a donor has two or more donations on the same day; 4) Duplicate Donations
4 where the donors appeared to make two or more contributions of the same amount on the same
5 day. Complainant alleges that the Committee accepted an unusually large number of
6 contributions that fit into these patterns, which it deemed to be suspicious and merit further
7 review.

8 2. Analysis

9 As discussed above, the Commission has provided guidance to committees that they may
10 use Internet fundraising so long as committees use reasonable safeguards to enable them to
11 verify the identity of contributors and screen for impermissible contributions with the same level
12 of confidence that applies to other methods of fundraising, and act consistently with Commission
13 regulations. See AO 1999-09 (Bill Bradley for President, Inc.). Complainants contend that the
14 Committee's acceptance of online contributions from the unknown persons identified in the
15 complaints is clear evidence that it had no control mechanisms in place to catch third party fraud.
16 Fling Complaint at 1; RNC Complaint at 3-4; Kohitz Complaint at 1. Consequently, the
17 complaints argue, an investigation of all contributions is warranted. *Id.* RNC Suppl. Complaint
18 at 3-5.

19 Respondents assert that the compliance system the Committee maintains is designed to
20 identify individuals like those cited in the complaint and refund their contributions if they are
21 unlawful. OFA Response in MURs 6078/6090/6108 at 4. The Committee asserts that its
22 internal system runs regular searches of its donor database in order to identify information that
23 contributions may be fraudulent. *Id.* at 5. The Committee also asserts that through its vetting

1 and compliance system, as individuals who provided fictitious information are identified,
2 subsequent searches are modified to look for similar individuals or patterns of fraudulent donors
3 that were previously identified. *Id.* Regarding the individuals identified in the complaint,
4 Respondents provide information that most of the fraudulent contributions from these individuals
5 had been identified and refunded before the complaints were filed. *Id.*

6 The complaint cites the names of eleven individuals with alleged fictitious names that
7 allegedly made contributions to the Committee. Only three of these individuals gave
8 contributions that were actually received and aggregated over \$1,000; they include:

- 9 • "Doodad Pro" made 850 contributions in \$25 increments totaling \$21,250,
- 10 • "Good Will" made 780 contributions in \$25 increments totaling \$19,500, and
- 11 • "Hbkjb, jkbkj" made a single contribution of \$1,077.23.

12 The "Doodad Pro" and "Good Will" contributions were refunded on a continuous basis either
13 before or within 30 days of the initial complaint in this matter, though many refunds were not
14 made within 30 days of the initial receipt of the contribution. The single "Hbkjb, jkbkj"
15 contribution was refunded within 30 days of receipt. Contributions from the remaining eight
16 donors cited in the complaint totaled approximately \$1,200; none of which has been refunded.

17 In order to ascertain whether there was a potential system breakdown that might have led
18 the Committee to accept large numbers of contributions from unknown persons, the Commission
19 reviewed a sampling of contributions to the Committee in the primary and general election
20 months of February 2008 and August 2008, respectively. During the sample period, the
21 Committee received a combined total of \$73,976,663 in contributions from over 170,000
22 contributors. The Commission also reviewed complaints, disclosure reports and media reports
23 for individuals whose information appeared to be incomplete, fictitious or otherwise unverified

1 as belonging to actual persons, as well as whether suspect contributions were accepted, verified
2 and, if appropriate, timely refunded by the Committee.

3 In addition to the contributors cited in the complaints, only six other contributors to OFA
4 whose names might have been fictitious based on the spelling or other information were
5 identified. These six contributors gave approximately \$17,445 to the Committee, \$14,476 of
6 which remains unrefunded. Thus, the complaints and the Commission's review identify a total
7 of 17 contributors with potentially fictitious names who gave a total of \$60,472 in contributions
8 to the Committee, \$15,676 of which has yet to be refunded.

9 The Commission determined that dismissal of these allegations is appropriate because (1)
10 the alleged breakdown in the Committee's compliance system is not borne out by the available
11 information about the scope and amount of the contributions the Committee received from
12 allegedly unknown persons, and (2) the majority (approximately 75%) of the prohibited
13 contributions received from the fictitious individuals cited in the complaint and identified
14 through the Commission's review have been refunded.

15 For these reasons, the Commission determined it would not be an efficient use of its
16 resources to open an investigation into this issue with respect to the Committee. *See Heckler v.*
17 *Chaney*, 470 U.S. 821 (1985); MUR 5950 (Hillary Clinton for President) (Factual and Legal
18 Analysis dismissing Section 441e violation to preserve resources where prohibited contributions
19 were refunded before the complaint was filed).

20 Accordingly, the Commission dismissed allegations that Obama for America and Martin
21 Nesbitt, in his official capacity as Treasurer, violated 2 U.S.C. § 441f by accepting contributions
22 from unknown persons in the name of another.